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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SUSAN L. ERICKSON et al.,	
Plaintiffs and Appellants,	G035396
v.	(Super. Ct. No. 04CC03499)
GEORGE WESLEY,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Reversed.

The Cifarelli Law Firm, Philip C. Cifarelli and Dawn M. Smith for Plaintiffs and Appellants.

La Follette, Johnson, De Haas, Fesler & Ames and Nancy H. McCoy for Defendant and Respondent.

* * *

INTRODUCTION

A husband and wife sued the wife's doctor for medical negligence, alleging the wife suffered injuries as a result of the doctor's wrongdoing. The husband also sued the doctor for loss of consortium. The defendant doctor moved for summary judgment or, in the alternative, summary adjudication. The trial court granted summary judgment in the defendant doctor's favor, concluding the statute of limitations on both claims expired before an amended complaint naming the doctor was filed. We conclude the court was correct in its analysis of the claim for loss of consortium, but incorrect regarding the claim for medical negligence.

Code of Civil Procedure section 364 requires that before initiating a lawsuit for medical negligence, a plaintiff must provide 90 days' notice to the defendant. (All further statutory references are to the Code of Civil Procedure.) In this case, the wife sent such a notice, which by law tolled the statute of limitations on the medical negligence claim. When the lawsuit was filed, it did not name the doctor as a defendant; the doctor was sued as a Doe defendant, so as not to violate section 364. This is an accepted procedure under the circumstances of this case. The complaint was amended to name the doctor as a defendant within the tolled limitations period. The medical negligence claim was therefore timely filed, and the trial court erred in granting summary judgment on the first cause of action for medical negligence.

The second cause of action for loss of consortium must be analyzed differently, however. The section 364 notice did not mention the claim for loss of consortium, and the notice cannot be read so broadly as to include such a separate, independent claim. The statute of limitations on that claim was therefore not tolled. The amendment to name the defendant doctor was not made within the limitations period, and that claim was therefore not timely filed. The trial court correctly determined the second cause of action was barred by the statute of limitations.

Therefore, we reverse the judgment, and direct the trial court to grant the motion for summary adjudication on the second cause of action for loss of consortium.

STATEMENT OF FACTS

On February 27, 2003, Dr. George Wesley performed coronary angioplasty and stenting on Susan L. Erickson at St. Joseph Hospital in Orange, California. Mrs. Erickson was discharged from the hospital on February 28. At home that same day, she experienced severe pain in her right lower abdomen and dizziness, and passed out. She was immediately taken to Corona Regional Medical Center. During surgery on March 1, 2003, doctors at Corona Regional discovered Mrs. Erickson had suffered a laceration of her right external iliac artery.

On January 9, 2004, Mrs. Erickson served a notice of intention to commence action on Dr. Wesley via certified mail, pursuant to section 364. An identical letter was sent to Dr. Wesley on January 20, 2004.

On March 1, 2004, the Ericksons filed a complaint against St. Joseph Hospital, "DOE 1 – Physician," and Does 2 through 25. The complaint alleges one cause of action for medical negligence, asserted on behalf of both Mr. and Mrs. Erickson, and one cause of action for loss of consortium by Mr. Erickson. On April 16, the Ericksons amended their complaint to name Dr. Wesley as DOE 1 – Physician.

Dr. Wesley moved for summary judgment, or alternatively for summary adjudication, and the trial court granted the motion. The Ericksons moved for reconsideration; their motion was denied. The Ericksons timely appealed.

DISCUSSION

I.

STANDARD OF REVIEW

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.

[Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see § 437c, subd. (p)(2).)

II.

THE TRIAL COURT ERRED IN DETERMINING THE MEDICAL NEGLIGENCE CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, BUT CORRECTLY DETERMINED THE LOSS OF CONSORTIUM CLAIM WAS UNTIMELY.

A.

The Limitations Period Began on March 1, 2003.

"In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (§ 340.5.) What constitutes discovery of the injury for purposes of section 340.5? The California Supreme Court has defined it thus: "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. As we said in *Sanchez* [*v. South Hoover Hospital* (1976) 18 Cal.3d 93] and reiterated in *Gutierrez* [*v. Mofid* (1985) 39 Cal.3d 892], the limitations period begins once the plaintiff '"'has notice or information of circumstances to put a reasonable person *on inquiry*

. . . .’”’ [Citations.] A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111, fn. omitted.)

In support of his motion for summary judgment, Dr. Wesley offered the following testimony from Mr. Erickson’s deposition.

“Q. So you really had no idea why your wife was being taken to surgery until after the surgery was done; is that correct?

“A. Now you’re talking about – I bring my wife home from St. Joe’s and into Corona Medical, and you’re asking if I have a reason to know what’s wrong with my wife right there? Is that what you’re asking?

“Q. Right.

“A. No, I had no idea what was wrong with my wife.

“Q. You understood something was wrong with your wife?

“A. Definitely.

“Q. Okay. Did you have an understanding – Did you attribute what was wrong with your wife to the surgery at St. Joseph’s Hospital or did you not know?

“A. I had to attribute [it] to the surgery at St. Joe’s because she came out of St. Joe’s. That’s why I was trying to call to CVICU or Dr. Pan. Dr. Pan being the only doctor I’ve met in that operation besides Wesley, who didn’t give me a card or anything. I had Dr. Pan’s card.”

Where the uncontradicted facts are susceptible of only one legitimate inference, the trial court may resolve a statute of limitations issue on summary judgment. (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at p. 1110.) Dr. Wesley argues the uncontradicted facts, as set forth in Mr. Erickson’s deposition, are susceptible of only one

legitimate inference – that on February 28, 2003, Mr. Erickson had at least a reasonable suspicion that Dr. Wesley's wrongdoing in Mrs. Erickson's care and treatment had caused her current injury.

Two recent cases, which are not cited or discussed by either party in the appellate briefs, help us determine when the Ericksons "suspect[ed] or should [have] suspect[ed] that [Mrs. Erickson's] injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at p. 1110.)

In *Artal v. Allen* (2003) 111 Cal.App.4th 273, 275-276, the plaintiff was intubated while undergoing a diagnostic laparoscopy in May 1998. She was advised she "might experience hoarseness and a sore throat for 24 to 48 hours after the surgery." (*Id.* at p. 276.) The plaintiff had severe throat pain immediately after the surgery, which continued for more than 48 hours. (*Ibid.*) The plaintiff saw at least 20 specialists in the 18 months following the surgery due to continued severe throat pain. (*Ibid.*) In April 1999, the plaintiff described her problem to one specialist as "'[p]ain in tongue, throat, neck, feeling of something in my throat all the time, recent sensation of numbness around chin (all on left side) pinching pain, *following intubation*.'" (*Ibid.*) In May 1999, the plaintiff provided a medical history to another doctor in which she stated, "'I don't know [the cause of my pain]. *I feel that some sort of trauma was caused during intubation*.'" Finally, after an exploratory surgery in November 1999, the plaintiff was informed that she had suffered a fracture of her thyroid cartilage, which was poking at the vertebral column. (*Ibid.*) On October 27, 2000, the plaintiff filed a lawsuit alleging professional negligence. (*Id.* at p. 277.)

After trial, the court ruled the plaintiff's claim was barred by the statute of limitations, which it concluded began to run no later than May 1999. (*Artal v. Allen, supra,* 111 Cal.App.4th at p. 277.) The appellate court reversed, concluding the evidence of the plaintiff's written statement in May 1999 regarding trauma caused during intubation "merely showed that [the plaintiff] suspected there was a connection between

the intubation and her throat pain. It does not support the conclusion that by May 6, 1999, [the plaintiff] knew, or by reasonable diligence should have known, that the throat pain was caused by professional negligence. That evidence did not materialize until the exploratory surgery on November 5, 1999, which revealed the thyroid cartilage fracture, a condition [the plaintiff] attributes to the intubation by Dr. Allen. There is nothing in the record to show [the plaintiff] could have, through greater diligence, discovered the negligent cause of her harm any earlier than the November 5, 1999, exploratory surgery." (*Id.* at pp. 280-281.)

In *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1294, the defendant doctor in a medical malpractice case moved for summary judgment on the ground the plaintiffs failed to file their lawsuit within one year after discovering their claims. The trial court denied the motion, and the defendant sought writ relief from the appellate court. (*Ibid.*) The appellate court granted the petition and directed the trial court to grant the motion. (*Id.* at p. 1304.) On November 20, 2000, the defendant doctor performed renal arterial stenting to treat the patient's renal stenosis. (*Id.* at p. 1293.) On November 21, two other doctors performed surgery to repair the patient's abdominal aortic aneurysm. (*Ibid.*) The patient died November 24, while still hospitalized. (*Ibid.*) The patient's wife and children filed a wrongful death action against the defendant on November 6, 2002. (*Id.* at p. 1294.) The plaintiffs admitted that shortly after the patient's death, they each "'suspect[ed] . . . that someone ha[d] done something wrong' to cause his death." (*Id.* at p. 1298.) The appellate court concluded the limitations period was triggered when the plaintiffs "suspected medical negligence, rather than when their investigation premised upon that suspicion led them to suspect that [the defendant] had been negligent." (*Id.* at p. 1301.)

Mr. Erickson's statement that, on February 28, he attributed what was wrong with his wife to the surgery at St. Joseph's does not establish that Mr. Erickson suspected or had reason to suspect anyone had done something wrong as of that date that

caused Mrs. Erickson's injury. It was logical for Mr. Erickson to assume some connection between Mrs. Erickson's hospital stay ending February 28 and the emergency care she required later that same day. There was no evidence before the trial court that the Ericksons suspected medical malpractice on February 28. It was not until after Mrs. Erickson's surgery on March 1, 2003, when the doctors at Corona Regional Medical Center discovered the laceration of Mrs. Erickson's artery, that the limitations period on the Ericksons' claims began to run.

B.

Was the Limitations Period Tolled?

We next consider whether the limitations period was tolled. Before filing a medical malpractice lawsuit, a potential plaintiff must first give the potential defendant 90 days' written notice: "(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. [¶] (b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. [¶] . . . [¶] (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice. [¶] (e) The provisions of this section shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name, as provided in Section 474." (§ 364.)

Mrs. Erickson (through her counsel) sent the required notice to Dr. Wesley under section 364 on January 9, 2004, 51 days before the statute of limitations would

have run.[1] The letter states The Cifarelli Law Firm "represents Susan L. Erickson who suffered injuries due to acts of malpractice and other tortious acts which were committed while Ms. Erickson underwent surgery performed by you at St. Joseph's Hospital. We will be representing Ms. Erickson in a legal action against you." The letter identifies Mrs. Erickson's losses and injuries as, "without limitation: pain, suffering, and physical and psychological injuries." The letter further states, "[a]s a result of your misconduct, Ms. Erickson has suffered injuries and damages, including pain and suffering, emotional damages, and related economic damages." The letter concludes, "Ms. Erickson hereby reserves the right to seek recovery of other damages based on other acts of professional negligence and tortious misconduct which are currently unknown to Ms. Erickson and may later be disclosed during discovery and any subsequent litigation."

The section 364 letter tolled the statute of limitations on the medical negligence claim for 90 days, until April 8, 2004, when the limitations period again began to run. There were 51 days left, and the limitations period on the medical negligence claim thus expired on May 29, 2004. (See *Woods v. Young* (1991) 53 Cal.3d 315, 328.)

Mr. Erickson did not send his own letter, and Mrs. Erickson's letter does not reference Mr. Erickson or a claim for loss of consortium. Mr. Erickson nevertheless claims the letter includes his claim for loss of consortium. In *Edwards v. Superior Court* (2001) 93 Cal.App.4th 172, 175, the defendant plastic surgeon performed outpatient reconstructive surgery on the plaintiff's breasts and nose. The plaintiff sent the defendant a section 364 notice stating that the plaintiff intended to file suit "'for damages resulting from medical negligence which resulted when [plaintiff] consulted you for plastic surgery and contracted e coli in her breast as a result of [the] surgery you performed.'" (*Ibid.*)

[1] Mrs. Erickson sent an identical letter on January 20, 2004. Neither party explains why the second letter was sent, or whether it had any effect on the tolling of the statute of limitations. We will ignore the second letter for purposes of our analysis.

The appellate court concluded this was adequate notice under section 364 for a claim based on the removal of too much nasal cartilage. (*Edwards v. Superior Court, supra*, 93 Cal.App.4th at p. 180.) "We hold, as a matter of law, a plaintiff's failure to allege the specific factual basis of each cause of action in the 90-day notice required by section 364 does not prevent her from alleging the omitted injury in the lawsuit filed against a medical practitioner." (*Id.* at p. 181.)

Using the analysis of *Edwards v. Superior Court*, we conclude the statute of limitations was tolled on the first cause of action for medical negligence, but not for the second cause of action for loss of consortium. A claim for medical negligence committed against Mrs. Erickson was encompassed within the language of the 90-day notice.[2] With respect to the claim for loss of consortium, however, this is a different case than *Edwards v. Superior Court*. Here, the potential plaintiff was a different person and the claim ultimately asserted was totally different. This scenario of a different person with a different claim is reminiscent of the case of *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468. In *Diliberti v. Stage Call Corp.*, the complaint named the wrong person as the plaintiff (the driver of the vehicle) and the body of the complaint asserted claims unrelated to the right person (the front seat passenger). This appellate court concluded that under these circumstances, an amendment to substitute the "right" person as the plaintiff should not be permitted after the limitations period had expired. (*Id.* at pp. 1470-1471; see also 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1152, pp. 611-612.)

The purpose of the 90-day notice requirement is to decrease the number of professional negligence lawsuits by encouraging parties to negotiate resolutions of their disputes "'"outside the structure and atmosphere of the formal litigation process."' [Citation.]" (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 214-215.)

[2] Whether Mr. Erickson can in fact pursue the medical negligence cause of action is not before us. He is identified as a party to the cause of action.

In this case, the purposes of the statute would not be furthered by permitting Mrs. Erickson's section 364 notice to cover Mr. Erickson's separate claim for loss of consortium. Mr. Erickson's claim for loss of consortium is independent of the claim for medical negligence. (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408.) It would have been possible for Dr. Wesley and Mrs. Erickson to have negotiated a resolution of her claims for personal injuries and resulting damages, only to permit Mr. Erickson to later file his own separate lawsuit for loss of consortium. We interpret statutes in such a way as will carry out the intent of the Legislature, and so as not to frustrate the manifest purposes of the statute. (*People v. Moore* (2004) 118 Cal.App.4th 74, 77-78.)

This does not end the analysis, however, since the Ericksons did file a complaint on March 1, 2004, which was timely as to the medical negligence claim. That complaint did not name Dr. Wesley, but rather listed him as a Doe defendant. We now consider whether the use of the Doe defendant procedure was fatal to those claims.

III.

WHAT IS THE EFFECT OF THE ERICKSONS' USE OF THE DOE DEFENDANT PROCEDURE TO NAME DR. WESLEY AS A DEFENDANT DURING THE PERIOD IN WHICH THE STATUTE OF LIMITATIONS WAS TOLLED AS TO THE FIRST, BUT NOT THE SECOND, CAUSE OF ACTION?

The trial court also granted summary judgment on both the first and second causes of action on the grounds Dr. Wesley was improperly added as a Doe defendant. When a plaintiff is "ignorant of the name of a defendant," he or she may sue that defendant as a Doe defendant, and amend the complaint when the defendant's true name is discovered. (See § 474.) Dr. Wesley contends the Ericksons improperly sued him as a Doe defendant, although the uncontradicted evidence is that the Ericksons were not ignorant of Dr. Wesley's name when they filed the complaint, since Mrs. Erickson had sent the section 364 notice to him almost two months before the complaint was filed.

In *Davis v. Marin* (2000) 80 Cal.App.4th 380, 382, the plaintiff was burned while undergoing chiropractic treatment on December 6, 1996. On December 1, 1997, the plaintiff's attorney sent a notification to the defendant doctor under section 364. (*Id.* at p. 383.) On December 2, 1997, the plaintiff filed a lawsuit for products liability and medical malpractice, naming only Doe defendants. (*Ibid.*) An amendment to the complaint was filed February 24, 1998, naming the defendant as Doe 101. (*Ibid.*)[3] The defendant moved for summary judgment, claiming the case was barred by the statute of limitations: "Citing Code of Civil Procedure section 474, [the defendant] argued that the February 24, 1998, amendment to the complaint was untimely because when the December 2, 1997, complaint was filed, [the plaintiff] knew of the existence of [the defendant] as a defendant." (*Id.* at p. 383.) The appellate court agreed with the plaintiff that the defendant was timely brought into the case through the Doe amendment, despite the fact the plaintiff unquestionably knew of the defendant's identity when the complaint was filed.

The defendant "was added to the lawsuit as a defendant *prior* to the expiration of the statute of limitations since the amendment to the complaint was filed within 90 days of the December 1, 1997, section 364 notice." (*Davis v. Marin, supra,* 80 Cal.App.4th at p. 387.) "As [the plaintiff] notes, she could have filed an *amended complaint* naming [the defendant] as a defendant, rather than an *amendment to* the complaint. Had this been done, the trial court would not have inquired as to whether or not [the defendant]'s identity was known to [the plaintiff]. Such an inquiry, and the analysis used under Code of Civil Procedure section 474, would have been irrelevant. [Citation.] There is no reason to treat [the plaintiff]'s amendment to the complaint any differently than we would have treated an amended complaint naming [the defendant] as

[3] An amended complaint was filed on March 26, 1998. (*Davis v. Marin, supra,* 80 Cal.App.4th at p. 383.) The appellate court did not consider the amended complaint as part of its analysis. (*Id.* at p. 384, fn. 2.)

a defendant. To do so would elevate form over substance and would ignore common sense." (*Ibid.*)[4]

Scherer v. Mark (1976) 64 Cal.App.3d 834, on which Dr. Wesley relies, is inapplicable because the injury in that case occurred before the enactment of section 364, and the plaintiff in that case was not faced with that section's prohibition against naming a medical professional in a complaint until after the 90-day notice requirement had been complied with. (See *Scherer v. Mark, supra*, 64 Cal.App.3d at p. 837.)

As noted above, the limitations period on the first cause of action for medical negligence was tolled until May 29, 2004. The Doe amendment was filed April 16, 2004, within the statute of limitations. The trial court erred by granting summary judgment on the first cause of action, based on the allegedly improper Doe amendment.

The second cause of action for loss of consortium, however, was barred by the statute of limitations. The statute of limitations was not tolled on this claim, and so Mr. Erickson could not benefit from later amendment of the complaint to add Dr. Wesley's name. The trial court did not err in summarily adjudicating Mr. Erickson's claim for loss of consortium.

DISPOSITION

The judgment is reversed. The trial court is directed to grant Dr. Wesley's motion for summary adjudication of the second cause of action for loss of consortium. In the interests of justice, because each party was successful in part on appeal, and because both parties failed to cite the relevant authorities, both sides shall bear their own costs on appeal.

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[4] Despite the close similarity between the facts of this case and those of *Davis v. Marin, supra*, 80 Cal.App.4th 380, neither party cited that case in the appellate briefs or in the memoranda of points and authorities filed with the trial court in connection with the motion for summary judgment or the motion for reconsideration.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.